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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-868

GLENN W. BRICKER,

Petitioner

v.

HENRY D. CRANE, JR., *et al.*,

Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Corrections to Statement of the Case

This is the second time the petitioner has sought certiorari from this Court to review claims which originally arose from the refusal of the respondent, Sceva Speare Memorial Hospital (herein Hospital) to renew his appointment to its staff. Because of the extended course of litigation which petitioner has undertaken and the importance of a prior adjudication to the result reached below, respondents' statement of the case requires a fuller than usual review of the previous courses pursued by the petitioner, as well as a clarification of the course pursued by the petitioner in this case.

This case had its beginnings in October 1970 when the Trustees of the Hospital declined to reappoint the petitioner to the Hospital's active medical staff. Staff appointments at the Hospital are for one year only and reappointments are considered annually by the Trustees, usually acting upon recommendations of a credentials committee. In this case, the credentials committee had recommended against reappointing the petitioner and that recommendation had been reviewed and affirmed by the credentials committee and by a "joint conference committee" in joint session, after a hearing in which the petitioner participated. The Trustees' action followed.

Immediately after he received notice of the action of the Board of Trustees, Dr. Bricker filed a Petition for Injunction in the New Hampshire Superior Court seeking to force his reappointment to the Hospital staff. This Petition was amended several times; and as finally amended, it contained, among other claims, allegations that Dr. Bricker had been denied due process in the failure to reappoint, that the reason for his non-reappointment was unrelated to his professional ability or competence, and that the hospital was subject to the supervision of the State of New Hampshire, that it received monies from towns, Hill-Burton funds and Medicare funds as well as other public monies. Except at the very beginning, the petitioner was represented by counsel at all stages of the state court action. A temporary injunction allowed the petitioner to continue his practice at the Hospital pending determination of the merits of the state court action.

Following trial, the New Hampshire Superior Court denied the petition for injunction, finding, in part:

> "The Court finds as a fact that Doctor Bricker has been a disruptive force at the Sceva Speare Memorial

Hospital; that he has acted in a way detrimental to the best interests of the institution; that he has acted in a way that is detrimental to the good practice of medicine by other members of the medical staff of the hospital; that he has acted in a way which is disruptive to the nurses and other administrative staff of the hospital; that he has conducted his personal life in such a way as to cause great personal concern and anxiety to the other members of the medical staff and the directors of the hospital; that his actions have had, in general, an adverse effect upon the smooth working relationships so necessary for adequate and essential health care. Finally, the Court finds that Dr. Bricker has conducted his medical practice, on occasion, in a way that could at best be described as unwise and at worse as highly unprofessional."

The court further found that Dr. Bricker's objectionable actions were adequately made known to him by formal and informal discussions with him for a long period of time prior to the hearing before the Joint Conference Committee and that meeting before the Joint Conference Committee offered Dr. Bricker fair opportunity to answer these complaints. The trial court in essence found that both substantive and procedural due process had been accorded Dr. Bricker. The trial court also found in essence that Dr. Bricker's testimony in malpractice cases was not the reason for his non-reappointment and further granted his request for ruling of law that such testimony would not be legal cause for non-reappointment.

After a motion for new trial was denied, the petitioner appealed the superior court decision to the Supreme Court of New Hampshire. That court held that the acceptance of Federal and town funds did not change the private character of the Hospital. *Bricker v. Sceva Speare*

Mem. Hosp., 111 N. H. 276, 279, 281 A.2d 589 (1971). Nevertheless the State Supreme Court held that the Hospital's action was subject to judicial review to determine the fairness of the procedure and to ensure that the action was not arbitrary, capricious or unreasonable. The New Hampshire Supreme Court concluded that the evidence supported the trial court's finding that the petitioner had not been deprived of procedural due process and that the Hospital's actions were not arbitrary, capricious or unreasonable. 111 N. H. at 280, 281.

After some additional pleadings in the state court, the petitioner sought review of the state court decision in this Court by petition for certiorari (civil number 71-462). That petition, the body of which is set forth in the appendix hereto, raised most of the issues raised in the present petition. Specifically the "reasons for granting the writ" numbers 1 and 2 are almost identical in both petitions. Dr. Bricker claimed that the state court had recognized and rejected his claimed denial of due process [App. 24], and that the state courts had decided a substantial question of due process against him [App. 25-26]. He further claimed that the hospital and the superior court had accepted as valid complaints against him the fact that he testified as an expert witness in malpractice cases [App. 27]. He also stated that the amendments to his petition alleging receipt of public funds were for the purpose of emphasizing that state action under the Fourteenth Amendment was involved [App 24].

The Court denied that petition on December 14, 1971, 404 U.S. 995 (1971).

On January 10, 1972 Dr. Bricker filed a Motion for a new trial in the New Hampshire Superior Court alleging

newly discovered evidence, perjury, etc., all allegedly discovered as a result of the hearings before the Board of Registration in Medicine, to which the Hospital was not a party, and also seeking a temporary injunction. The issue before the Board was whether or not Dr. Bricker's license to practice should be revoked or suspended for the limited reasons set forth in N. H. RSA 329:17, not whether he should be allowed to practice in the Hospital. After a hearing, the New Hampshire Superior Court denied both the Request for Temporary Injunction as well as the new trial. That decision was never appealed.

On January 13, 1972, the petitioner instituted the present action in the United States District Court for the District of New Hampshire, again seeking injunctive relief to restore him to the staff of the Hospital. This time, the complaint named as defendants not only the Hospital but also its medical staff and members of the executive committee of its Board of Trustees, along with three insurance companies. The complaint charged the defendants with "conspiracy to wrongfully and unlawfully deprive [petitioner] of his capacity to earn his living and practice his chosen profession" in violation of the First, Fifth and Fourteenth Amendments and the Civil Rights Act of 1871.[1]

As noted, the only remedy sought in the complaint as first drawn was reinstatement in the Hospital. The petitioner later amended the complaint to name the three

[1]Previously, on June 23, 1971, the petitioner had instituted a diversity action against the three insurance company respondents, charging them with comspiracy to interfere with petitioner's professional practice. Petitoner's motion to consolidate the diversity case with the present case was denied and it still is pending in the District Court. The petitioner is represented by counsel in that case.

attorneys as defendants and add a claim for two million dollars damages arising out of the failure of the Hospital to reappoint him. The several defendants in their several answers and in motions to dismiss, sought dismissal of the action upon the pleadings and upon the grounds of res judicata and collateral estoppel. After a hearing at which all parties were given an opportunity to present written memoranda as well as oral argument, the District Court dismissed the complaint against all defendants on grounds of res judicata, collateral estoppel, and failure to state a cause of action. The court ruled that the complaint failed to state a claim against the respondent attorneys and insurance companies under 42 U.S.C. § 1983 because it alleged no facts sufficient to color their actions with state law. The trial court further ruled that the complaint failed to state a claim against any of the defendants under 42 U.S.C. § 1985 (3) because it did not allege any racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' alleged action. The trial court went on to rule that the petitioner could not maintain a claim against the Hospital, its staff or its trustees under 42 U.S.C. § 1983 because the "state action" issue had been resolved against him in the state court suit and could not now be relitigated.[2]

The petitioner appealed that result after denial of several post-dismissal motions in the district court. Briefs were duly filed in the Court of Appeals for the First Circuit and oral argument was heard by that court in early September 1972. After the Court of Appeals took this case under advisement, but before it rendered a

[2]The district court had granted a preliminary injunction to permit the petitioner to continue to treat his patients at the Hospital. That preliminary injunction has remained in effect during the pendency of the petitioner's appeal.

decision on the appeal, the petitioner, on September 20, 1972, sought to revive his original state court action. He filed a motion for new trial in the state court, citing alleged newly discovered evidence. Appendix F to the present petition is an advertisement which the petitioner caused to be inserted on the front page of the Plymouth, N.H. *Record*, setting forth some of the materials he relied upon in that motion. The motion was denied.[3]

On November 7, 1972, the Court of Appeals affirmed the District Court's dismissal of this case (see Appendix A to petition). The appellate court agreed that the petitioner was estopped to relitigate the issue of state action, reiterating that the Civil Rights Act is not a vehicle for collateral attack upon final state court judgments. The appellate court also agreed that the petitioner failed to meet the minimum requirements for stating a claim under 42 U.S.C. §1985 (3) as he had not sufficiently alleged the requisite class-based discrimination. The Court of Appeals rejected the petitioner's attempt to raise the provisions of 42 U.S.C. §1985 (2) for the first time on appeal.

The petitioner now seeks review of that decision through a writ of certiorari. The respondents oppose such review.

---

[3]Since the denial of that motion in the state court and the result reached by the Court of Appeals in this case, the petitioner has sought to keep his state court action alive by moving to recuse the state Superior Court justice for prejudice in favor of the Hospital. He has also instituted an action against the respondent Crane in the state court, seeking money damages for alleged defamation of character.

REASONS FOR REFUSING TO GRANT THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL QUESTION IS RAISED BY THE COURT OF APPEALS' INVOCATION OF THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL. THE PETITIONER'S CONSTITUTIONAL CLAIMS ARE BARRED BY THAT DOCTRINE AND THEREFORE WOULD NOT BE REACHED FOR CONSIDERATION BY THIS COURT.

No substantial or unresolved federal questions are raised by the petition because the doctrines of res judicata and collateral estoppel are dispositive of the instant case and this Court will not be required to address itself to the plaintiff's alleged constitutional claims. The plaintiff's prior litigation in the courts of the State of New Hampshire has determined adversely to the plaintiff all of the substantive claims asserted in the present case and as noted, this Court has already denied a prior petition for a writ of certiorari raising those same issues.

That the courts of last resort of United States are competent to determine Federal constitutional questions is beyond cavil. *E.G., Robb v. Connolly*, 111 U.S. 624, 637 (1884). It is likewise established that having chosen to litigate his Federal claims in the courts of a state, an aggrieved litigant may seek direct review only in this Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969); *see England v. Louisiana Medical Examiners*, 375 U.S. 411 (1964). This the plaintiff herein has done, and he has lost.

Having sought to litigate his constitutional claims in the courts of the State of New Hampshire and having pursued his appellate rights therefrom to their termination, the plaintiff is now barred from reasserting his contentions through the Federal system by those judicial doctrines prescribing a finality to litigation. The plaintiff's attempts to avoid those doctrines by a recharacterization of his claims as violations of the Federal Civil Rights Statutes and by the addition of an allegation of conspiracy are unavailing. Such modifications do not alter the gravamen of his cause of action. See *P.I. Enterprises, Inc. v. Cataldo*, 457 F.2d 1012 (1st Cir. 1972); *Johnson v. Department of Water and Power*, 450 F.2d 295 (9th Cir. 1971); *Skoknick v. Martin*, 317 F.2d 855 (7th Cir. 1963).

The gravamen of the plaintiff's claim throughout his extended litigation in both the State and Federal courts has remained constant. In his initial suit brought in New Hampshire courts against the Sceva Speare Memorial Hospital, also a defendant in the instant case, the plaintiff alleged that he had been denied procedural due process in the Hospital's failure to reappoint him to its medical staff and that he had been discriminated against in his denial of reappointment because of his testimony in medical malpractice litigation. These are the selfsame allegations made by the plaintiff in the case at bar. Additionally, in each case the remedy requested by the plaintiff was identical: readmission to the staff of the Hospital.

The trial court in the State litigation expressly resolved these contentions against the plaintiff. That court found that the plaintiff had received adequate notice of the charges facing him and was afforded ample opportunity to defend himself against those charges. The court also held that the plaintiff had not been denied reappoint-

ment to the staff of the Hospital because of his courtroom activities, but, on the contrary, because of his disruptive and unprofessional behavior both at and away from the Hospital. Finally, the trial court ruled that the receipt by the Hospital of some federal monies and a federal tax exemption did not alter the Hospital's status as a private institution. The court determined in conclusion that the actions of the Hospital were not arbitrary, capricious or unreasonable and denied the plaintiff's request for readmission to its medical staff.

The Supreme Court of New Hampshire affirmed the findings of the trial court. *Bricker v. Sceva Speare Memorial Hospital*, 111 N.H. 276, 281 A.2d 589 (1971). Initially, the Court determined that the Hospital was a private hospital and therefore not cloaked with the mantle of state action. *Ibid.* The Court did not terminate its inquiry there, however, for it concluded that the exclusion of a physician must nevertheless "be done in accordance with the bylaws of the hospital (citations omitted) and will be reviewed by the courts and set aside if arbitrary, capricious, or unreasonable." *Id.* at 111 N.H. 276, 280. The Court thereupon proceeded to adopt the trial court's findings that the plaintiff had been afforded a full and fair hearing and that the cause for his denial of reappointment to the medical staff was his disruptive conduct and destructive influence upon the efficiency of the Hospital and its staff. In sum, the Court held that "the evidence supports the trial court's finding that defendant's actions were not arbitrary, capricious, or unreasonable. . . . " *Id.* at 111 N.H. 276.

In his earlier petition for a writ of certiorari from the decision of the Supreme Court of New Hampshire, the plaintiff specifically recognized that his Federal constitutional claims of a denial of procedural due process and

discrimination because of his testimony in medical malpractice cases had been considered by the courts of New Hampshire and he sought review in this Court of their adverse determinations. In regard to his due process claim, the plaintiff contended that,

> Due process in an administrative hearing implies the right to notice, and the right to notice implies a statement of charges in sufficient detail and sufficiently in advance of hearing to permit the preparation of a defense.

See Appendix, p. 25, *post.* In connection with his charge of discrimination, he argued,

> It is submitted that for the respondent and the Superior Court to have accepted as valid complaints against petitioner's tenure the fact that he testifies as an expert witness for plaintiffs in medical malpractive actions, and to have justified their decisions against petitioner, in part, on the basis of that activity . . . violates petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment. . . .

See Appendix, p. 27, *post.* Finally, the plaintiff attempted to bring his claims within the aegis of the Federal Constitution by stating that,

> Petitioner's staff status with respondent, as a hospital substantially aided by federal and local governments, is well within the scope of the Fourteenth Amendment protections against state action. . . .

See Appendix, p. 26, *post.*

As has been stated, the plaintiff's previous petition for a writ of certiorari to the New Hampshire Supreme Court was denied by this Court. 404 U.S. 995 (1971). Yet despite the record of the State court proceedings and the plaintiff's own admissions quoted above reflecting that all

of his constitutional claims had been adjudicated in the State courts, the plaintiff has proceeded undaunted to reassert these identical claims in the Federal courts. At this point, however, the plaintiff is barred from relitigating these issues by the doctrines of res judicata and collateral estoppel.

Insofar as the Hospital and its privies, the medical staff, and board of directors, are concerned, the plaintiff herein is barred by res judicata from asserting not only those claims which actually were litigated in the courts of New Hampshire, but also those which could have been litigated. *Rhodes v. Jones*, 351 F.2d 884 (8th Cir. 1965); *Coogan v. Cincinnati Bar Association*, 431 F.2d 1209 (6th Cir. 1970). In other words, as to the primary defendants in the case–the only ones who can grant the plaintiff the readmission to the Hospital that he seeks–the plaintiff is completely barred from relitigating his claims and the instant petition presents no constitutional or other substantial federal question for this Court to review.

Irrespective of the doctrine of res judicata, moreover, all defendants in the present case, including the three insurance companies and the two attorneys, are entitled to rely upon collateral estoppel to preclude consideration of the merits of the plaintiff's contentions. This Court has only recently determined that any defendant may make defensive use in a second suit of an adverse determination against a plaintiff who was also a plaintiff in the original suit. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). This ruling is totally consistent, furthermore, with the common law of the State of New Hampshire. *Brown v. R. D. Werner Co.*, 428 F.2d 375 (1st Cir. 1970); *Sanderson v. Balfour*, 109 N.H. 213, 247 A.2d 185

(1968). Consequently, all defendants herein may preclude relitigation by the plaintiff of all issues actually decided by the courts of New Hampshire.

As has been described above, the State court proceedings determined three issues germane to the plaintiff's cause of action: (1) that the Hospital was not imbued with state action; (2) that the plaintiff was not denied procedural due process of law in being rejected for reappointment to the medical staff; and (3) that the plaintiff was not denied reappointment because of his testimony in medical malpractice cases.

It was recognized by the District Court and the Court of Appeals below that the lack of state action is dispositive of all of the plaintiff's claims under 42 U.S.C. 1983. This is because that statute creates a cause of action only for activities conducted "under color of state law." It is suggested, however, that the plaintiff's claim under 42 U.S.C. 1985 that he was denied equal protection of the laws also requires that the facility from which he was excluded, i.e., the Hospital, or that the persons who so excluded him, i.e., the Hospital staff and board of directors, be associated in some way with state action. *See Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). If indeed some element of state action is required to state a cause of action under 42 U.S.C. 1985 as well as under 42 U.S.C. 1983, the findings of the New Hampshire courts that the Hospital is a private hospital would collaterally estop the plaintiff from asserting any of his claims against any of the defendants herein.

In any case, regardless of the existence or nonexistence of state action, the plaintiff's claims that he was denied due process and was subjected to discrimination were decided adversely to him in the State court proceedings and therefore bar the plaintiff's claims herein. Whether

the plaintiff's claims are subsumed under 42 U.S.C. §1983 or 42 U.S.C. §1985, his substantive constitutional claims have been determined not to exist and such findings are binding upon him with respect to his action against each and every defendant herein.

In sum, the instant petition does not present this Court with any constitutional questions which are likely to be reached for decision. No dispute among the courts within the Federal system exists with respect to the scope of res judicata or collateral estoppel and no significant federal questions arise out of the application of those doctrines to the facts of this case. Perhaps the most apt description of the present case is found in the commentary of another District Court judge concerning a similar action then pending before his court,

> This action is a typical example of the kind of action being filed with increasing frequency under the provisions of the Civil Rights Act of 1871, (Citations omitted.) Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by the results of such proceedings, these persons lash out at judges, attorneys, witnesses, court functionaries, newspapers, and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to relitigate the issues on which they have once lost and hoping to secure sizeable damages to boot.

Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S. D. Col. 1966).

II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL QUESTIONS ARE RAISED BY THE COURT OF APPEALS' DISPOSITION OF FEDERAL STATUTORY ISSUES.

The Court of Appeals' resolution of the statutory issues in this case involve no questions not previously settled by this Court nor do they create conflicts either with previous decisions of this Court or with the decisions of other circuits nor do they involve any abuse of the accepted or usual course of judicial proceedings.

The appellate court required a showing of "state action" as a necessary prerequisite to a claim under 42 U.S.C. §1983. This is fully in accord with this court's explicit holding in *Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). In this respect it breaks no new ground and generates no new controversy. The effect of res judicata and collateral estoppel on the state action question has been discussed earlier in this brief.

The Court of Appeals demanded sufficient allegation of "racial or otherwise class-based invidiously discriminatory animus" to support the petitioner's claim under 42 U.S.C. §1985 (3). No such allegation was made at all in the petitioner's original complaint in the District Court. Only after the District Court Dismissed the complaint did the petitioner attempt to amend by adding a conclusory allegation that he was a member of a "class" of physicians who testified in medical malpractice cases. The Court of Appeals gave the petitioner an opportunity to expand on that allegation during the course of oral argument but as the court noted, the petitioner could allege no facts supporting the existence of such a class and admitted that he might be its only "member" in the state. That was deemed insufficient.

The Court's requirement of "class-based invidiously discriminatory animus" as an essential element of a §1985 (3) conspiracy claim follows the express requirement of *Griffin v. Breckenridge*, 403 U.S. 88 (1971) and so opens no new area but rather conforms to a previous decision of this Court. The Appellate Court's requirement of a sufficient allegation of a class-based discrimination accords with a similar decision in another circuit. *Jacobson v. Industrial Foundation of the Permian Basin*, 456 F.2d 258 (5th Cir. 1972). Its concern for the petitioner is demonstrated by the unusual opportunity it afforded the petitioner to expand an allegation of a complaint during oral argument on appeal. This can hardly be classed as "procedural abuse" prejudicial to the petitioner.

The Court of Appeals declined to accept the petitioner's appellate reliance on 42 U.S.C. §1985 (2) as ground for reversal of the District Court's judgment. No claim to a conspiracy to obstruct justice under that section had been made either in the petitioner's original complaint or in any of his several motions to amend. As the Court of Appeals put it, only a "fleeting" reference was made for the first time in the petitioner's appellate brief. Under these circumstances, the Court of Appeals committed no procedural abuse when it refused to consider the claim for the first time on appeal. The petitioner's claim for relief under 42 U.S.C. §1981 was similarly disposed of.

In short, the Court of Appeals' resolution of the statutory issues in this case present none of the considerations which might merit review on certiorari. Supreme Court Rule 19, ¶1. (a).

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

Peter V. Millham, Esquire
101 Court Street
Laconia, New Hampshire 03246

Eugene M. Van Loan, III, Esquire
95 Market Street
Manchester, New Hampshire 03101

David Woodbury, Esquire
1838 Elm Street
Manchester, New Hampshire 03105

Martin L. Gross, Esquire
9 Capitol Street
Concord, New Hampshire 03301

January 15, 1973

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

The Petitioner, Glenn W. Bricker, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Hampshire entered in case No. 6156a.

OPINION BELOW

The opinion of the Supreme Court of New Hampshire, not yet reported, appears in Appendix A hereto. The opinion of the court of first instance, the Superior Court of New Hampshire, appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on July 29, 1971, Appendix A below. 1/ A timely motion for rehearing was denied on August 31, 1971,

1/ Under New Hampshire practice the opinion of the Supreme Court ending in the notations "Exceptions overruled; Petition Dismissed" along with the denial of the motion for rehearing, constitutes the judgment.

and timely motions to remand to the Superior Court for the taking of further testimony, filed on June 1, 1971, and August 9, 1971, were respectively denied on July 20 and August 31, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Is a state chartered private charitable hospital corporation, operating as the only hospital in the community or within a 25 mile radius, so linked with the state by being financed, in part, by local government contributions, Hill-Burton construction funds and Medicare, that the Fourteenth Amendment imposes due process limitations on its removal of the tenure status of physicians who are members of its staff?

2. Is the tenured staff physician of such a hospital denied due process when the hospital refuses to give him notice of charges against him either before or during the hearing on which the removal action will be based?

3. Is the physician denied due process when the hearing body receives and considers, on the question of his fitness to retain tenure, evidence of the fact that he testifies for plaintiffs in medical malpractice actions?

4. Is the physician denied due process when the substance and findings of such hearing are reported only orally to the separate body which determines his tenure and when that body then ends his tenure without a statement of reasons therefor?

5. Is the physician denied due process when, in seeking injunction in the state courts against the hospital's ending of his tenure, the courts accept as evidence on the merits of the case testimony as to specific acts of his alleged misconduct which were unmentioned in the hospital's proceedings and were not specially pleaded in court by the hospital?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a physician, qualified for membership on the "active staff" of the respondent, a privately incorporated charitable hospital and the only hospital within a radius of about twenty-five miles. Appointments to the active staff are made annually. In October, 1970, after petitioner had been a member for several years, he was denied reappointment. In this litigation he complains against respondent's proceedings which led to this denial.

Under the Hill-Burton Act (60 Stat. 1041 (1946) as amended, 42 U.S.C. 291 et seq.) respondent has received substantial federal aid in the construction and expansion of its building. It also receives funds voted by nearby local governments under state enabling legislation, New Hampshire Revised Statutes Annotated 31:4-VI.

Although active staff members' appointments are only for a year at a time, respondent's bylaws give important tenure protection. The appointing body, the lay Board of Directors, may fail to reappoint a member only on recommendation of both the active staff itself and the staff credentials committee, (a distinct body whose membership, by by-law, is identical with the active staff). In 1970, the staff and committee each consisted of ten members, including petitioner. Further, a physician receiving an unfavorable recommendation from staff and committee is entitled to a hearing before the joint conference committee of the directors and staff; the latter committee must report to the directors before the reappointment can be denied.

In August, 1970 the active staff voted against petitioner's reappointment. The credentials committee took the same action a few days later at a meeting of which petitioner, a member, received no notice. However, respondent notified petitioner that his non-reappointment had been recommended, and advised him of his hearing rights before the joint conference committee.

Petitioner requested the hearing, which was then duly scheduled, and he also requested an advance specification of the charges against him. The latter request was refused and no statement of complaints against his conduct or qualifications was given him by respondent either before or at the hearing, although individual members of the directors and staff made complaints against him at the hearing itself. No reason was then given for refusing the specification of charges but respondent's lay president later testified (Exhibit 10, pages 47-48:)

"Dr. Bricker, in a phone conversation, at least, asked me

what the particular charges were, which I construed to be asking, in a sense, of giving him a list against, for which he could erect a defense, I guess you might say, and this certainly was not my idea of how the meeting should be conducted. He was, in general, aware of the situation that was becoming, what we call was untenable there, and his disruptive influence among the other doctors, and to give him a bill of particulars or try to conduct this in any legal court fashion was not our intention. It was simply to get at the basic elements of the matter and the dissension between the other doctors and himself and whether or not he was, in general, good for the hospital or bad for the hospital. It was not intended to be conducted by any rules that are generally applicable to the courtroom rules."

The hearing on October 14, 1970, lasted several hours and consisted mostly of petitioner's attempts first to learn the specifics of the complaints against him and then refute, on the spot, those that were stated.

Complaints presented against petitioner at the hearing, as well as later testimony presented by the respondent in the present litigation, included objections to his practice of testifying for plaintiffs in medical malpractice actions.

Following the joint conference committee hearing, the committee voted not to renew petitioner's appointment, but did not specify reasons. The president and vice president of respondent, both of whom were members of the committee, reported orally to the board of directors on the reasons for the recommendation (Exhibit 5-B). The board voted to end petitioner's appointment, and the president notified him of this by letter on October 20, 1970, again without specification of reasons (Exhibit 4-G.)

Petitioner immediately sought temporary and permanent injunctions against respondent in the Superior Court, alleging that he had been denied "due process of law" in respondent's proceedings. The court issued a temporary injunction on December 1, 1970 (see Reserved Case).

Upon hearing on the merits of the petition for permanent injunction the Superior Court dismissed the petition. Over timely objection by the petitioner, the court had considered evidence of complaints against petitioner which had neither been presented at the joint conference committee hearing, nor specially pleaded by respondent, nor otherwise formally presented to him.

Under New Hampshire practice, petitioner's exceptions were reserved to the New Hampshire Supreme Court (see Reserved Case) which overruled them.

While agreeing that no specification of charges was given petitioner at any time after non-reappointment proceedings began in August 1970, the Superior Court found that "his objectionable actions were adequately made known to him by formal and informal discussions with him for a long period prior to the October 14, 1970 hearing. (Appendix B.) The Supreme Court of New Hampshire described this notice as "by formal notifications and informal discussions", (Appendix A.) but the petitioner submits that to the extent that the record permits any finding of such notice, it does not meet Fourteenth Amendment standards. The only earlier formal notices to petitioner of any significance were:

(1) A letter threatening to end his appointment if an incident similar to a clash between him and the chief nurse in the spring of 1970 should again occur (the record shows that the directors had tried and con-

victed the petitioner of fault in this incident, in absentia and without notice; no recurrence of such an incident prior to the non-reappointment proceedings is alleged);

(2) A formal warning early in 1970 regarding his arrearages in keeping records of his patients' cases;(no arrearage was claimed to exist at the time of his non-reappointment);and

(3) A letter sent to petitioner six years earlier (July 14, 1964), conditioning his continued staff status on his harmonious working with the respondent's personnel and staff. (Two years later respondent advanced petitioner to active staff from the less privileged "courtesy staff".)

Aside from these remote formal notices, respondent has shown no more than that various staff members and personnel have, at unspecified times, made various complaints to petitioner about his conduct, orally or in some other informal manner.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner, a physician, after being refused in repeated attempts to engage counsel for what the Superior Court recognized to be an unpopular cause (Exhibit 7, pages 157 and 159), originally appeared pro se, preparing and presenting his own "Petition for Injunction" and "Motion to Amend Petition for Injunction" (see Reserved Case). He claimednot only specific violations by respondent of its by-laws (paragraphs 11, 19 and 21), but also violations of his rights to "due process of law" (paragraphs 22 and 25) for the several reasons set forth in other paragraphs.

The Supreme Court of New Hampshire has on several occasions construed the words "due process" or "due process of law" as implying and carrying the sense in which they are used in the Fourteenth Amendment. See Corning Glass Works v.

Max Dichter Co. 102 N.H. 505, 509, 161 A.2d 569 (1960); Opinion of the Justices, 66 N.H. 629, 633, 33 A.1076 (1891); and In re Mundy 97 N.H. 239, 241 (and dissenting opinion at page 247), 85 A.2d 371 (1952). Although the New Hampshire Constitution has no "due process" clause using those words, its phrase "law of the land" (Constitution of 1783 as amended, Part I, art. 15th) has been construed in the cited decisions to carry the same effect as the Fourteenth Amendment's due process clause.

After petitioner had engaged counsel and before hearing on the merits, a further "Motion to Amend Petition for Injunction" was filed (Reserved Case), alleging respondent's receipt of public funds, both federal and local, to emphasize that State action under the Fourteenth Amendment was involved.

In its opinion with decree (Appendix B), the Superior Court recognized that petitioner particularly claimed a denial of "due process in not being given a statement of the charges to be made against him", and rejected this claim in its dismissal of his petition. Requests for rulings of law substantially covering the due process claim were denied by the court; see Reserved Case, Plaintiff's Requests for Findings of Fact and Rulings of Law, page 3 and 4, requests Nos. 2 (b), 8 and 10, and ruling thereon in Appendix B.

The Supreme Court of New Hampshire also expressly entertained petitioner's due process claim (Appendix A, page 17) based on respondent's refusal to specify charges to him, and rejected the claim.

Finally, the Fourteenth Amendment basis of petitioner's claims was renewed in his "Motion for Rehearing" to the Supreme Court of New Hampshire (see certified record from that court) and its assertion by petitioner throughout the

litigation was expressly acknowledged on Page 3 of respondent's "Answer to Plaintiff's Motion for Rehearing" (certified record of the New Hampshire Supreme Court).

REASONS FOR GRANTING THE WRIT

I THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT SUSTAINS RESPONDENT'S DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS WITHOUT NOTICE OF CHARGES, IN CONFLICT WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

Fourteenth Amendment protections apply to staff appointment and removal procedures at state chartered private hospitals like the respondent which receive substantial federal construction assistance under the Hill-Burton Act and operating and capital gifts from local government bodies. Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A., 4th Circuit, (1963), cert. den. 376 U.S. 938; Eaton v. Grubbs, 329 F.2d 710 (C.A., 4th Circuit, 1964); Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F.2d 648 (C.A. 4th Circuit, 1967); Sams v. Ohio Valley General Hosp. Ass'n., 413 F.2d 826 (C.A., 4th Circuit, 1969); Foster v. Mobile County Hospital Board, 398 F.2d 227 (C.A. 5th Circuit, 1968), 37 ALR 3d 637. Each of these cases, it should be noted, involves the equal protection clause rather than the due process clause of the Fourteenth Amendment.

Due process in an administrative hearing implies the right to notice, and the right to notice implies a statement of charges in sufficient detail and sufficiently in advance of hearing to permit the preparation of a defense. While there is no simple formula

to determine in advance the adequacy of notice under the due process clause in all situations, its adequacy must be judged, at least in part, against the relative difficulty or ease to the party giving notice of providing a full and adequate statement of the essentials of the matter to be considered, and the relative importance or unimportance of the matter to the party receiving the notice. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Goldberg v. Kelley, 397 U.S. 254 (1970); Drown v. Portsmouth School District, 435 F.2d 1182 (C.A., 1st Circuit, 1970).

The petitioner submits that he, no less than the welfare recipients in the Goldberg case, is entitled under the Fourteenth Amendment to "timely and adequate notice detailing the reasons for a proposed termination" (397 U.S. 267 - 268). See also Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (C.A., 5th Circuit, 1971) on the applicability of the due process clause to medical staff appointments.

It is further submitted that the conduct of both the respondent, in basing its action on charges of which petitioner had no notice before the hearing, and the New Hampshire courts in affirming the respondent's action after accepting proof of additional charges which were not specially pleaded, further violate petitioner's Fourteenth Amendment due process rights as established by this court in Re Ruffalo 390 U.S. 544 (1968).

In summary, petitioner's staff status with respondent, as a hospital substantially aided by federal and local governments, is well within the scope of Fourteenth Amendment protections against state action under the principle followed in the Simkins case (supra) and other cases cited from the Courts of Appeals in the Fourth and Fifth Circuits. The Supreme Court of New Hampshire has here, in a situation within the scope of Fourteenth

Amendment limitations, decided a substantial question of due process against the party claiming the protection of that right and against the due process principles set forth by this Court in Re Ruffalo and Goldberg (supra). The national scope of the Hill-Burton Act and the thousands of physicians and hospitals presently involved in staff membership relationships such as that which petitioner claims for himself here are factors to suggest that the discrepancy in the application of these principles between the Supreme Court of New Hampshire and the courts in the federal jurisdiction might now appropriately be corrected.

II THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS BECAUSE IT SUSTAINS RESPONDENT'S DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS FOLLOWING HEARING AT WHICH EVIDENCE OF PETITIONER'S TESTIMONY IN MEDICAL MALPRACTICE CASES PER SE WAS ACCEPTED AS A SUBSTANTIAL CHARGE AGAINST HIM.

Question 3 presented here (page 2 above) is an important although subsidiary matter. It is submitted that for the respondent and the Superior Court to have accepted as valid complaints against petitioner's tenure the fact that he testifies as an expert witness for plaintiffs in medical malpractice actions, and to have justified their decisions against petitioner, in part, on the basis of that activity (with no showing that the testimony he gives is in any way improper per se), violates petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment and his rights of free speech under the First Amendment, not to mention the fact that it raises serious questions in regard to the administration

of the courts. Particularly, for the respondent and the courts to discriminate against the petitioner as a medical expert witness would appear to constitute an unjustifiable classification of him. See Sams v. Ohio Valley General Hosp. Ass'n. (supra).

III PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED BY THE DIVISION BETWEEN RESPONDENT'S HEARING AND DECIDING BODIES.

Question 4 (page 2 above) presents several further subsidiary due process matters. Since respondent kept no record of the proceedings and discussion at the joint conference committee hearing of October 14, 1970, and only an oral report was made to the deciding body, the board of directors, and since the board then ended petitioner's tenure without a statement of reasons, his Fourteenth Amendment rights have been violated. Morgan v. United States, 298 U.S. 468 (1936). Drown v. Portsmouth School District (page 10, supra).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully Submitted,

BERNARD I. SNIERSON

51 Church Street
Laconia, New Hampshire 03246

September 29, 1971

CERTIORARI DENIED